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# Employment Rights and Wrongs: ADA Issues in the 2001-2002 Supreme Court Term

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# EMPLOYMENT RIGHTS AND WRONGS: ADA ISSUES IN THE 2001-2002 SUPREME COURT TERM

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The Supreme Court's decision-making is beginning to fall into a discernible pattern. That is to say, in recent Terms, many opinions have followed the same analytical strategy so that we can begin to anticipate not only the outcome, in a certain type of case, but also the analytical route by which the outcome will be reached. The pattern is evident in cases that broaden the application of the most controversial and narrowly decided Rehnquistian precedents. By using carefully selected rules of statutory construction, the Court has been able to extenuate the polemical nature of those precedents and to enlarge the range of circumstances to which they apply. Statutory construction, considered the most technical, neutral, and deferential ground for interpreting and applying law, has become an effective vehicle for the Court's conservative activism and a subtle method for advancing its conservative agenda.

This pattern stands in stark contrast to the use the Rehnquist Court made of these interpretive rules in its early years. Then, it evinced a different kind of conservatism: one characterized by judicial restraint. In its early years, the Rehnquist Court enjoyed a reputation for deciding ideologically divisive cases on narrow grounds. It selected rules of statutory construction to maintain jurisprudential stability and to build consensus.[1] In recent Terms, statutory construction has metamorphosed into a tool for ideological activism. Americans with Disabilities Act ("ADA") cases in the Court's 2001-2002 Term illustrate the strategy.

## I. AFFIRMATIVE ACTION

The Court rendered several important workplace discrimination decisions this Term, but one closely watched case was a "non-starter" which surprised some observers and disappointed others. The Court granted writ of certiorari to *Adarand Constructors, Inc. v. Mineta*[2] in 1994 to address the constitutionality of a federal affirmative action program administered by the Department of

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1. *See* Barbara K. Bucholtz, *Gestalt Flips by an Acrobatic Supreme Court and the Business-Related Cases on its 2000-2001 Docket*, 37 Tulsa L. Rev. 305, 308-09 (2001).

2. 512 U.S. 1288 (1994).

Transportation ("DOT") under its Small Business Act ("Act") highway construction program.[3] This was the third time the Court reviewed the case.

In *Adarand I*, the Court reviewed a challenge to the DOT's affirmative action program under the Act.[4] The program gave priority in highway construction projects for "a Disadvantaged Business Enterprise" ("DBE").[5] A business was certified as "disadvantaged" if it was owned or controlled by socially or economically disadvantaged groups including "Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities . . . ."[6] Randy Pech, Adarand's principal who was a white male, brought the suit, alleging the program was discriminatory on the basis of race in violation of the Federal Government's Fifth Amendment Equal Protection Clause.[7] In 1990, Adarand Constructors submitted the low bid for a guardrail job on a federal highway construction project, but because of the DOT affirmative action program the job was awarded to a Hispanic contractor.[8]

The Court held that the program should be analyzed under a strict scrutiny standard (establishing a presumption that all racially discriminatory programs violate the Fifth Amendment) and remanded the case for analysis pursuant to that ruling.[9] On remand, the District Court found the program did not survive strict scrutiny.[10] On appeal, the Tenth Circuit found that the issue was moot because DOT had certified Adarand as a DBE in the intervening period of time.[11] When the Supreme Court addressed the Tenth Circuit ruling, it found the record inadequate and reversed and remanded the case again for development of the record and a reapplication of its strict scrutiny test to the supplemented record.[12] On remand, and in response to the expanded record, both the District Court and the Tenth Circuit found that the program could not pass the strict scrutiny test mandated in 1997.

The Tenth Circuit also looked at the revised regulations, which were put in place by the Clinton Administration pursuant to its "'mend it, don't end it'" strategy, for preserving core aspects of its affirmative action program.[13] The Tenth Circuit found that those regulations[14] posed no Fifth Amendment problem.[15] Pech

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3. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *see* Pub. L. No. 87-305, 75 Stat. 666, 667-68 (1961) (as enacted 15 U.S.C. § 637(d)(i) (2000)).

4. *Adarand Constructors, Inc. v. Pena*, 515 U.S. at 205-06.

5. *Id.* at 209.

6. *Id.* at 205; *see* 75 Stat. at 667-68 (as amended 15 U.S.C. § 637(d)(i)).

7. *Adarand Constructors, Inc. v. Slater*, 169 F.3d 1292, 1296-97 (10th Cir. 1999). *Adarand*, 515 U.S. at 205-06. For a detailed discussion of the case, *see* Barbara K. Bucholtz, *Private Sector Issues in a Public Sector Retro-lution: The Supreme Court's Business-Related Decisions in the October 1999 Term*, 36 Tulsa L.J. 153, 168-69 (2000).

8. *Adarand*, 515 U.S. at 205.

9. *Id.* at 237-38.

10. *Adarand Constructors, Inc. v. Pena*, 965 F. Supp. 1556 (D. Colo. 1997).

11. *Adarand Constructors, Inc. v. Slater*, 169 F.3d at 1296-97.

12. *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 224 (2000) (per curiam).

13. David G. Savage, *Adarand Didn't Add up*, 88 ABA J. 26 (Jan. 2002).

14. 49 C.F.R. § 26 (1999) (promulgated pursuant to the *Transportation Equity Act for the 21st Century*, Pub. L. No. 105-178, § 1101(b)(1), 112 Stat. 107, 113 (1998)).

again appealed the case to the Supreme Court, seeking a definitive ruling against the affirmative action program. In March, 2001, the Court obliged by granting Pech's petition for writ of certiorari. The Court reviewed the certified record and found that Pech's challenge covered issues not raised in the lower courts[16] and resolved that the petition should be "dismissed as improvidently granted."[17] Thus, the Court refused to pull the trigger on an affirmative action program, originally found to be subject to strict scrutiny, but not amenable to review under the circumstances.[18] This was also the case with the affirmative action program at the University of Texas where, in *Texas v. Hopwood*,[19] the Court refused to hear a subsequent appeal after the University revised its program.

While opponents of affirmative action were disappointed by the Court's refusal to view *Adarand* as an opportunity to end race-based affirmative action definitively, they should not have to wait long for another opportunity. The Court will undoubtedly be asked to review other affirmative action programs and to reach the ultimate issue shortly.[20] By contrast, the Court had no trouble reaching definitive resolution of disputes brought under an anti-discrimination statute.

## II. AMERICANS WITH DISABILITIES ACT

All sides agree that the ADA[21] is a difficult statute to interpret because it is replete with ambiguities. Over the last several Terms, the Court has, for the most part, attempted to resolve those ambiguities in ways that narrow its application. An exception was the 1998 case of *Bragdon v. Abbott*,[22] where the Court held that an individual who tested positive for HIV was protected by the provisions of the ADA.[23] However, in the following (1998-1999) Term the Court held in *Sutton v. United Air Lines, Inc.*,[24] that the threshold standard for ADA protection (a "physical or mental impairment that *substantially limits* one or more of the major life activities of an individual") should be interpreted to exclude impairments

15. *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1157-59 (10th Cir. 2000). The Tenth Circuit also found Pech and his company either lacked standing or waived any right to challenge these programs. *Id.* at 1160.

16. The Court found that Pech was challenging not the federal law pertaining to procurement of federal funds for federal projects directed by states—the law under review by the Court of Appeals on remand, but the federal law pertaining to direct procurement of federal highway construction funds for DOT projects on federal lands—which the Court of Appeals did not consider. The Court declared that "ordinarily [it would] not decide in the first instance issues not decided below" and, further, that it would not examine *sua sponte* a lower court ruling that Pech lacked standing, and dismissed the writ of certiorari. *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 108 (2001) (per curiam).

17. *Id.* at 111.

18. *Id.* at 109 .

19. 518 U.S. 1033 (1996).

20. Commentators point to the case involving two affirmative action programs at the University of Michigan. The Supreme Court granted the writ of certiorari in *Grutter v. Bollinger*, 2002 WL 1968753 (S. Ct. Dec. 2, 2002).

21. 42 U.S.C. §§ 12101-12213 (2000).

22. 524 U.S. 624 (1998).

23. *Id.* at 655.

24. 527 U.S. 471 (1999).

which, like myopia, can be corrected.[25] *Sutton* also declared that it is not an ADA violation for employers "to establish physical criteria" as job qualifications even though the criteria could serve as an automatic bar to applicants with an impairment.[26]

In the 1998-1999 Term, the Court also decided *Albertson's, Inc. v. Kirkingburg*,[27] which built upon *Sutton* and fueled its interpretive momentum. The Court held that a disability or impairment, like monocular vision, which can be compensated for by the impaired employee himself (according to the Court, an employee's sightlessness in one eye is accommodated or counterpoised by his other eye's vision) is not an impairment requiring ADA protection.[28] In a third case that Term, *Murphy v. United Parcel Service, Inc.*,[29] the Court ruled that the impairment must disqualify an employee or job applicant from a "broad range of jobs," not just a particular job.[30] In *Murphy*, the job at issue required the applicant to meet federal standards for driving commercial vehicles. He could not meet the standards because of his high blood pressure.[31] "At most," said the Court, "petitioner has shown that he is regarded as unable to perform the job of mechanic only when that job requires driving a commercial motor vehicle—a specific type of vehicle used on a highway in interstate commerce."[32] The Court also decided that a collective bargaining agreement purporting to require that discrimination claims be arbitrated did not waive the employee's statutory right to a judicial forum, as the language of the waiver was not "clear and unmistakable"; thus, ADA litigation was not precluded.[33] Finally, in *Cleveland v. Policy Management Systems Corporation*,[34] the Court considered whether a suit could be brought under the ADA by an individual who made statements on an application for Social Security Disability Insurance benefits that she was unable to work.[35]

In the 2000-2001 Term, the Court, again narrowed the Act's reach with regard to three diverse ADA issues. In *Board of Trustees of the University of Alabama v. Garrett*,[36] five Justices applied their burgeoning federalism doctrine to hold that state employees were barred from suing state employers because of the Eleventh Amendment protection of sovereign immunity.[37] In *Buckhannon Board*

25. *Id.* at 482 (quoting 42 U.S.C. § 12102(2)(A) (emphasis in original).
26. *Id.* at 490-91.
27. 527 U.S. 555 (1999).
28. *Id.* at 565-67.
29. 527 U.S. 516 (1999).
30. *Id.* at 523 (quoting 29 C.F.R. § 1630.2(j)-(3)(i) (1998)).
31. *Id.* at 519.
32. *Id.* at 524.
33. *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 79-81 (1998).
34. 526 U.S. 795 (1999).
35. *Id.* at 806. For a more complete discussion of these cases, *see* Barbara K. Bucholtz, *Business as Usual in a "Dollar Democracy": A Review of Business-Related Cases in the 1998-1999 Supreme Court Term*, 35 Tulsa L.J. 485, 489 (2000).
36. 531 U.S. 356 (2001).
37. *Id.* at 360. Although *Garrett* narrows ADA's coverage by denying state employees access to the Courts, undoubtedly its principles will be applied to bar litigants with claims under analogous federal

*and Care Home, Inc. v. West Virginia Department of Health and Human Resources*,[38] the issue was whether a plaintiff-employee could avail himself of the ADA's fee-shifting statutes by showing that the lawsuit was based on the "catalyst theory" which caused the employer to change its conduct. In *Buckhannon*, the employer changed its conduct prior to adjudicatory resolution of the case.[39] Prior to *Buchhannon*, the majority of circuits permitted plaintiffs to use the "catalyst theory" to establish "prevailing party" status in similar cases as support for costs and fees applications.[40] *Buckhannon* ruled that fee-shifting is only available if judicial resolution of the case created the change.[41] By rejecting the dominant circuit court view, the Court foreclosed the availability of ADA remedies to many employees. Justice Ginsberg pointed out in her dissent that many litigants rely on the broader view of the catalyst theory to ensure that they can retain effective counsel without the risk that the employer can escape fee-shifting exposure by affecting a voluntary compliance (gotcha) posture prior to judicial resolution.[42]

The third case brought under the ADA in the 2000-2001 Term received the most media attention, although it will doubtless have the least impact on ADA jurisprudence. Its high profile owes much more to the popularity of the sports event at issue than to the legal issue it addressed. In *PGA Tour, Inc. v. Martin*,[43] the Court held that a competitor in a golf tournament was entitled to an ADA disability accommodation (in this case, the use of a motorized golf cart to traverse the golf course) because it did not "fundamentally alter the nature" of the tournament.[44] "Fundamentally alter" is one of a number of ambiguous concepts in the Act that invite litigation.

In the most recent Term, the Supreme Court addressed the ambiguity of core concepts in the Act in three of the four ADA cases it decided.[45] The first of these cases, *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*,[46] required the Court to revisit some of the threshold coverage issues it addressed in the 1999 cases of *Sutton*, *Murphy*, and *Albertsons*. In *Toyota,* the Court had to decide if a plaintiff-employee's carpal tunnel syndrome and related afflictions were disabilities covered by the ADA because they "substantially limit[ed her]...

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civil rights statutes. For a more complete discussion of this case and other employment cases decided in the 2000-2001 Term, *see* Bucholtz, *supra* n. 1, at 309-13.

38. 532 U.S. 598 (2001).

39. *Id.* at 600.

40. For a more comprehensive discussion of *Buckhannon*, *see* Bucholtz, *supra* n. 1, at 325-26.

41. 532 U.S. at 605.

42. *Id.* at 622 (Ginsburg, J., dissenting). For a more comprehensive discussion of *Buckhannon*, *see* Bucholtz, *supra* n. 1, at 325-26; Marcia Coyle, *Some in Congress Seek to Restore "Catalyst" Fees*, Natl. L.J. A8 (Sept. 16, 2002) (reporting that there are now two bills in Congress, H.R. 5179 and S. 106, which abrogate *Buckhannon*).

43. 532 U.S. 661 (2001).

44. *Id.* at 683.

45. In the order in which the opinions were rendered, they are: *Toyota Motor Mfg., Ky., Inc. v. Williams*, 122 S. Ct. 681 (2002); *U.S. Airways, Inc. v. Barnett*, 122 S. Ct. 1516 (2002); *Chevron U.S.A., Inc. v. Echazabal*, 122 S. Ct. 2045 (2002); *Barnes v. Gorman*, 122 S. Ct. 2097 (2002).

46. 122 S. Ct. 681.

major life activities."[47] A unanimous Court held that they were not.[48] In so holding, the Court clearly attempted more precisely to define these core ADA concepts. But as the following analysis reveals, the devil was in the details.

### A. *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*

Ella Williams, who had been employed for several years at the same job at defendant's automobile manufacturing plant, was required to use pneumatic tools in her work. After several years at the same job, she developed bilateral carpal tunnel syndrome, tendonitis, and other related physical problems.[49] She was advised by her doctor to avoid tasks that would exacerbate the afflictions, such as frequent lifting and carrying, repetitive motions engaging wrists and elbows, and the use of vibrating instruments.[50] The employer responded to her condition by assigning her to a vehicle inspection team. For three years, she attended to the tasks of inspecting cars "for defective paint and manually wiping down each newly painted car as it passed on the conveyor."[51]

During that time, her condition was not aggravated by the work. Some time later, she was also required to wipe down each vehicle with "highlight oil," a task which required her "to grip a block of wood with a sponge attached to the end and wipe down the passing cars . . . at the rate of approximately one car per minute."[52] Because this task required her to engage in repetitive motions and to keep her arms at shoulder level for extended periods of time, it aggravated her infirmities, at which point she asked for an accommodation to be reassigned to her previous inspection job.[53] Williams alleged that the employer refused to reassign her and that this refusal ultimately led to her termination.[54] After receiving her EEOC right to sue letter, Williams filed a lawsuit against her employer asserting a claim under the ADA.[55] Thus, the ADA issue before the trial court was whether the employer's refusal to accommodate her condition violated the Act.[56] The trial court granted the employer summary judgment on the ADA claim, finding that Williams' condition did not qualify as a covered "disability."[57]

The ADA protects a "qualified individual with a disability" which is to say "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[58] "Disability" is defined by the Act, in relevant part,

47. *Id.* at 686 (quoting 42 U.S.C. § 12102(2)(A)).
48. *Id.* at 692.
49. *Id.* at 686.
50. *Id.*
51. *Williams v. Toyota Motor Mfg., Ky., Inc.*, 224 F.3d 840, 842 (6th Cir. 2000) (amended opinion).
52. *Id.*
53. *Id.*
54. *Id.*
55. *Toyota Motor,* 112 S. Ct. at 687.
56. *Id.*
57. *Id.* at 687-88.
58. *Id.* at 689 (quoting 42 U.S.C. § 12111(8)).

as: "(A) a physical or mental impairment that *substantially limits* one or more of the *major life activities* of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."[59]

The dispute on the motion for summary judgment focused on subsection (A): Were Williams' carpal tunnel syndrome and related physical infirmities impairments that substantially limited any of her major life activities? Williams argued that her condition met the characteristics of a "disability" described in subsection (A) because her condition prohibited her from performing manual tasks (like the repetitive lifting and reaching tasks which aggravated the condition),[60] household chores (housework, gardening, playing with children, etc.), lifting, and working.[61] The trial court, in granting the employer's motion for summary judgment, found that these physical impairments did not constitute a "disability" because (1) the household work she identified was not a major life activity; (2) the manual tasks she identified in her work assignments (along with "lifting and working") were major life activities, but the evidentiary record did not sustain her claim that she was "substantially limited in lifting or working"; and (3) her evidence that she was substantially limited in performing the manual tasks at issue was "irretrievably contradicted" by evidence that she performed tasks on the inspection team without difficulty.[62] The Sixth Circuit reversed that ruling.[63]

Noting the Act's lack of clarity and relying upon *Sutton*'s attempt to resolve the ambiguities of subsection (A), the Sixth Circuit, found that Williams' evidence met the *Sutton* requirement. The Court noted that the inability to perform the manual tasks at issue constituted more than the skills for a *particular* job, but rather included a *range* of jobs. The Sixth Circuit found Williams met that requirement because:

> Her ailments are analogous to having missing, damaged or deformed limbs that prevent her from doing the tasks associated with certain types of manual assembly line jobs, manual product handling jobs and manual building trade jobs (painting, plumbing, roofing, etc.) that require the gripping of tools and repetitive work with hands and arms extended at or above shoulder levels for extended periods of time.[64]

Accordingly, said the court, her manual task claim must survive summary judgment, and because it did, the Sixth Circuit did not believe the trial court needed to decide whether her work itself qualified as a "major life activity." It read *Sutton* and the EEOC regulations to say that working should "be viewed as a residual life activity, considered, as a last resort, *only* 'if an individual is not substantially limited with respect to *any other* major life activity.'"[65] Furthermore, it expressly refused to consider her household chores as "major tasks," opining

59. *Id.* (quoting 42 U.S.C. § 12102(2)) (emphasis added).
60. *Toyota Motor,* 224 F.3d at 843.
61. *Toyota Motor,* 122 S. Ct. at 687.
62. *Id.* at 688.
63. *Toyota Motor,* 224 F.3d at 845.
64. *Id.* at 843.
65. *Id.* (quoting *Sutton*, 527 U.S. at 492) (emphasis original).

that the relevant inquiry was not whether Williams could perform "isolated, nonrepetitive" personal hygiene tasks or household chores, but whether her condition prevented her from performing the kind of "manual tasks" involved in her assigned tasks at work.[66] In sum, the Sixth Circuit ruled that her impairment was a covered disability and it reversed and remanded the lower court's ADA ruling, noting that "Williams must still demonstrate the remainder of her prima facie case, and . . . defendant is still free to raise any viable defenses as to why it was unable to accommodate Williams, such as undue hardship and business necessity."[67]

The Supreme Court reversed the Sixth Circuit's ADA ruling. In so doing, it relied on a number of sources, but primarily on EEOC regulations, legislative history, and its own precedent (*Sutton*). First, wrote Justice O'Connor, the EEOC regulations have defined "substantially limited" to mean:

> "[u]nable to perform a major life activity that the average person in the general population can perform"; or "[s]ignificantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity."[68]

Then she concluded that this regulation should be construed narrowly because Congress intended the Act to cover only a small percentage of disabled people.[69] Surely, she inferred, because that number represents only a fraction of disabled citizens, the class covered by the Act was similarly limited.

Then, Justice O'Connor turned to *Sutton* as additional support for her narrow reading. "*Sutton* said only that *when the major life activity under consideration is that of working*, the statutory phrase substantially limits requires . . . that plaintiffs allege they are unable to work in a broad class of jobs."[70] *Sutton*, she declared, did not hold that working was a major life activity; it did not decide that "difficult question." It merely stated that, assuming working was a major life activity, then plaintiff would be required to show an incapacity to perform a "broad range" of jobs, not just a particular job.[71] Thus, and in accord with EEOC regulations, the concept of a "broad range" or "class" of skills pertains only to the putative concept of "working."[72] The Sixth Circuit's error, continued O'Connor, was in applying the concept to the range of tasks associated only with Williams' job.[73] The Sixth Circuit's focus was misplaced. It was not those tasks that constituted major life activities, but rather the "household chores,

66. *Toyota Motor*, 224 F.3d at 843.
67. *Id.* at 844.
68. *Toyota Motor*, 122 S. Ct. at 690 (quoting 29 C.F.R. § 1630.2(j) (2001)).
69. *Id.* at 691 (quoting 42 U.S.C. § 12101(a)(1) which states that Congress "found that [only] some 43,000,000 Americans [in 1990 had] . . . one or more physical or mental disabilities").
70. *Id.* at 692 (quoting *Sutton*, 527 U.S. at 491) (internal quotation marks omitted).
71. *Id.*
72. *Id.* at 693 (citing 29 C.F.R. § 1630.2(j)(3)).
73. *Toyota Motor*, 122 S. Ct. at 693.

bathing, and brushing one's teeth [that] are among the types of manual tasks of central importance to people's daily lives . . . ."[74]

Justice O'Connor also emphasized that the analysis will require a case-by-case "individualized assessment."[75] The major life activities in Williams' case were brushing her teeth, washing her face, bathing, tending her flower garden, fixing breakfast, doing laundry and "pick[ing] up around the house," tasks which Williams could perform. While household and personal tasks she could not perform: sweeping, dancing, driving long distances, and restricted activities like playing with her children and gardening were not "of central importance to most people's daily lives."[76]

The foregoing recitation of this adjudication odyssey, the extensive recitation of the pre-litigation facts, and the procedural history of the case seemed necessary for gleening some understanding of the case and its import. First, without question this is a decidedly pro-business decision. Not surprisingly, "the business community cheered the decision."[77] Indeed, business has much to celebrate—undoubtedly this case raises the bar and forecloses an ADA remedy for many employees with similar "nontraditional injuries." But it is also important to notice that the victory celebrated by the business community is far from total. As one commentator explained, the strategy in *Toyota Motor* was not simply to win that particular lawsuit, but to effect a result which would "clos[e] the courtroom door" to these kinds of cases and it aimed at "'keeping the lid on ADA litigation.'"[78] This, the O'Connor opinion failed to do. "'The definition of disability is the ballgame,'" announced two commentators.[79]

As the fact-specific reasoning in Justice O'Connor's opinion attests and as her "individualized assessment" rule mandates, the case may open almost as many doors as it closes. If driving long distances is not a major life activity, is driving short distances a major life activity? And if it is not, how short is short? What if an individual is capable of performing part of the tasks associated with fixing breakfast (putting eggs in boiling water, for example) but incapable of performing other tasks (picking up a pot of boiling water, for example). What about caring for one's children? Is the capacity to pick-up and carry a child a major life activity? Is it of central importance to people's lives? Are these not the questions that, because of O'Connor's analysis, invite resolution by juries? In *that* regard, might subsection (C) of the statute (that a disability also includes afflictions that are so "regarded") require jury resolution?[80] What about the act of working itself (the issue the Court admits to ducking in both the *Sutton* case and in *Toyota Motor*)?

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74. *Id.*
75. *Id.* at 692.
76. *Id.* at 694.
77. Mary Johnson, *Disabling a Civil Right: The Supreme Court Has Made a Decision That Is Wrongheaded, and Wrong*, 274 The Nation 20, 22 (Feb. 11, 2002).
78. *Id.*
79. *Id.* (quoting Samuel Issacharoff and Justin Nelson).
80. *Toyota Motor*, 122 S. Ct. at 687 (quoting 42 U.S.C. § 12102(2) (emphasis added)).

Given that the ADA is a statute concerned exclusively with discrimination in the workplace, is resolution of the issue whether "working" is a major life activity not a critically important, even if "difficult," issue to resolve?[81] As Robert L. Bosenbaum, arguing for Williams, insisted, "The ADA is about working, the ability to have a job, a basic American value."[82]

A second reason for the extensive iteration of the record in this case is to show how the ostensibly technical and objective technique of statutory construction can be used to achieve result-oriented ends, which implicate broad policy and political issues. This technique permits the Court to engage in judicial activism in the guise of judicial restraint and deference. Ostensibly the *Toyota Motor* decision was reached by means of statutory construction. It expressly looked at dictionary definitions of important terms to divine their plain meaning;[83] it looked at legislative findings and history to ascertain legislative intent;[84] and it looked deferentially at relevant agency regulations.[85] It also relied heavily on its own precedent, *Sutton*. In *Sutton*, as in *Toyota Motor*, the Court gave special emphasis to the fact that Congress stated in the Act that "some 43,000,000 Americans have one or more physical or mental disabilities."[86] Additionally, in support of its argument that the ADA should be construed narrowly to restrict its coverage, the Court quoted the majority opinion in *Sutton* regarding this statistic.[87]

But overreliance on one statistic in all of the Act's text and its legislative history can create a kind of "judicial myopia," brought about by a "legislative myopia" as Justice Stevens pointed out in his *Sutton* dissent.[88] The 43,000,000 figure might reveal itself to be simply a Congressional miscalculation when additional evidence of legislative intent is considered. Justice Stevens, in his *Sutton* dissent, began his own process of statutory construction by noting the penultimate rule of statutory construction.[89] Stevens quoted the Act for its explicit, if indefinite, statement of congressional "Purpose": "'to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.'"[90]

The disability at issue in *Sutton* was correctable myopia and the issue was whether such a condition fell within the Act's stated purpose. To paraphrase the issue, if an individual lost a limb but was able to perform major life activities with

81. *Id.* at 692.

82. Linda Greenhouse, *Justices Try to Determine the Meaning of Disability*, N.Y. Times A16 (Nov. 8, 2001) (available at <http://www.nytimes.com>) (internal quotation marks omitted).

83. *Toyota Motor*, 122 S. Ct. at 691-92 (quoting *Webster's Third New International Dictionary* and the *Oxford English Dictionary* for a definition of "substantially" as in "substantially limits" and *Webster's* for a definition of "major").

84. *Id.* at 691.

85. *Id.* at 689.

86. *Id.* at 691.

87. *Id.*

88. *Sutton*, 527 U.S. at 487.

89. *Id.* at 496 (Stevens, J., dissenting) ("As in all cases of statutory construction, our task is to interpret the words of [the statute] in light of the purposes Congress sought to serve.").

90. *Id.* at 497 (quoting 42 U.S.C. § 12101(b)(1)).

the aid of a prostheses, could an employer (consistent with the Act) refuse to hire him for a job for which he was qualified because he had a prosthesis, because he had corrected or ameliorated his impairment?[91] To answer the question, Stevens looked beyond the relevant provisions (both the purpose statement[92] and the Act's definition of "disability"[93]) to the legislative history, specifically the Senate report.[94] That report unequivocally stated that "'whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids.'"[95] And he added that "All of the Reports, indeed, are replete with references" to that interpretation of the Act (that it was designed to cover correctable disabilities, congressional miscalculation of the size of the class covered notwithstanding).[96] Stevens then turned to relevant agency interpretation, finding that "each of the three Executive agencies charged with implementing the Act ha[ve] consistently interpreted the Act as mandating that the presence of disability turns on an individual's uncorrected state."[97] Finally, he quoted EEOC guidelines for the proposition that the determination of "disability" should be made "'without regard to mitigating measures . . . .'"[98]

Stevens' conclusion was in accord with the uniform agency and congressional committee interpretation as well as that of all the circuits which had considered the issue of a "correctable disability" (with the exception of the Tenth Circuit from which *Sutton* arose):[99] that the Act was not designed to exclude individuals with correctable impairments from its coverage.

What, then, to do with the Court's heavy reliance on the figure of 43,000,000 (identified by the Act as the number of disabled people in 1990)? Stevens reminded us that, "It has long been a 'familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes.'"[100] He added that, in deference to that interpretive approach, the Court has "consistently construed [anti-discrimination and other remedial statutes like Civil RICO] to include comparable evils within their coverage, even when the particular evil at issue was beyond Congress' immediate concern in passing the legislation."[101] Thus, long-venerated canons of statutory construction do not compel the narrow reading of "disability" reached in *Sutton*, in *Murphy*, in

91. *Id.*
92. *Id.* at 499.
93. *Sutton*, 527 U.S. at 497-99.
94. *Id.* at 497. Stevens cites *Garcia v. U.S.*, 469 U.S. 70 (1984): "[I]n surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which represen[t] the considered and collective understanding of those Congressmen involved in drafting and studying the proposed legislation." *Id.* at 76 (internal quotation marks omitted).
95. *Sutton*, 527 U.S. at 499-500 (quoting Sen. Rpt. 101-16, at 23 (Aug. 30, 1989)).
96. *Id.* at 501.
97. *Id.*
98. *Id.* at 501 (quoting 29 C.F.R. pt. 1630, App. § 1630.2(j) (1998)).
99. *Id.* at 471 n. 1 (identifying all the circuit courts which had addressed the issue of ameliorated disabilities).
100. *Sutton*, at 504 (quoting *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967)).
101. *Id.* at 505.

*Albertson's* (the 1999 cases addressing the term), and now in *Toyota Motor*. It is clear that the Supreme Court chose canons, which seemed to require a narrow interpretation of the Act. That interpretation allowed the Court to reach a certain result, a result that consistently and increasingly restricts the Act's coverage.

The policy implications of that interpretation and the impact it will have on the public are unhappily not so narrow. To the extent that the decisions in *Sutton*, *Murphy*, *Albertson's,* and *Toyota Motor* serve to exclude large numbers of individuals from the workplace, they raise significant questions, not only about individual rights, but also about the impact on society of excluding otherwise qualified individuals from the workplace. Undoubtedly, resolution of public policy concerns triggered by the Court's narrow interpretation of the ADA are properly within the purview of Congress. Indisputably, the narrow interpretation by the Court was occasioned by the pervasive ambiguities in the Act. But until Congressional clarification is forthcoming, the Court should not become a surrogate legislature. It should return to the posture of judicial restraint it previously advocated. *Toyota Motor*, then, is one case which illustrates how the Court shifts a body of law further to the (political) right by achieving an (ideologically) right answer under cover of selected canons of statutory construction[102] and the "normalizing" effect of its own precedent.[103] "But wait," as the late night television commercials advise, "there's more."

### *B. U.S. Airways, Inc. v. Barnett*

In *U.S. Airways, Inc. v. Barnett*,[104] the second ADA decision rendered this Term, the Court used statutory construction to resolve a dispute about priorities: given a conflict between an ADA "reasonable accommodation" and a seniority system, who holds the trump card? Barnett was a cargo handler at U.S. Airways and injured his back on the job.[105] Based on his seniority, he sought transfer to a mailroom job, which did not exacerbate his back injury.[106] However, when another employee with greater seniority bid for his position, the employer elected to give preference to the senior employee pursuant to the employer's seniority system.[107] Barnett was subsequently terminated and he sued under the ADA, claiming the employer breached its duty to reasonably accommodate him.[108] The question the Supreme Court addressed was whether the employer's conduct was permitted under the ADA. The ADA mandates that an employer afford

102. This is not to suggest, however, that the selected use of the canons is a game exclusively played by the conservatives on the Court; as Karl Llwelyn has pointed out, that game is endemic to the art of advocacy. *See* Barbara K. Bucholtz, "*Sticking to Business*," 34 Tulsa L.J. 207, 207 n. 3 (1999).

103. For example, earlier cases which narrowed the terms at issue in *Toyota Motor* were decided by a divided Court: *Sutton* was decided by a seven-to-two vote, as was *Murphy*, while *Albertson's* received three concurrences. *Toyota Motor,* relying on this 1999 precedent, was unanimous.

104. 122 S. Ct. 1516.

105. Note that like the impairment in *Toyota Motor*, Barnett's disability was created on the job, at the employer's worksite.

106. *Id.* at 1519.

107. *Id.*

108. *Id.*

reasonable accommodation to a "qualified" individual.[109] Accommodation is not "reasonable" if it would impose an "'undue hardship'" on an employer's business.[110] However a "'reasonable accommodation' may include reassignment . . . to a vacant position."[111] Most federal appellate courts, in synthesizing these provisions of the Act in similar situations, have concluded that the employer must reassign the employee to a position that accommodates his impairments.[112] In support of this conclusion, courts have cited the Act, which defines a "'qualified' disabled individual" as a person "who can perform the job he or she 'holds or desires.'"[113] Courts have also cited the above provision that a reassignment to a vacant position constitutes a reasonable accommodation.[114]

The circuits have also uniformly held that when the reassignment conflicts with another "nondiscriminatory employment policy" (like a seniority system) that has been implemented pursuant to a collective bargaining agreement ("CBA"), then the reassignment is not mandated by the ADA. In other words, the ADA does not compel an employer to contravene the terms of an existing CBA to accommodate the impaired employee's request for reassignment.[115] But the issue in *U.S. Airways* takes this evolving interpretation one step further: If the seniority policy is not part of a CBA, does it also prevail against an ADA reassignment? On this issue, the Circuits had been split.[116] For example, the Seventh Circuit in *EEOC v. Humiston-Keeling, Inc.*,[117] held that a nondiscriminatory company policy trumped a qualified impaired employee's request for reassignment when she was competing with employees who were more qualified for the job.[118] But in *U.S. Airways*, the Ninth Circuit held that a similarly valid company policy did not work as an absolute bar against an ADA reassignment.[119] The court said that it was only one factor that must be considered on a case-by-case basis.[120]

The Ninth Circuit grounded its decision primarily by reference to EEOC guidelines that the ADA requires employers to provide reasonable accommodations to individuals with disabilities, including reassignment, even though they are not available to others. Therefore, "[a]n employer who does not

109. *Id.* at 1520 (quoting 42 U.S.C. §§ 12112(a), 12111(8)).

110. *U.S. Airways*, 122 S. Ct. at 1520 (quoting 42 U.S.C. §§ 12112(b)(5)(A), 12111(9)(B)).

111. Michael Starr, *Analyzing the ADA*, Natl. L.J. A19 (Apr. 1, 2002) (citing *Gaul v. Lucent Technologies, Inc.*, 134 F.3d 780, 786 (3rd Cir. 1998); *Dalton v. Subaru-Isuzu Automobile, Inc.*, 141 F.3d 667, 668 (7th Cir. 1998)).

112. *Id.*

113. *Id.* (citing *Davis v. Fla. Power & Light Co.*, 205 F.3d 1301, 1307 (11th Cir. 2000)); *Felliciano v. R.I.*, 160 F.3d 780 (1st Cir. 1998).

114. *Id.* (citing *Davis*, 205 F.3d at 1307); *Felliciano*, 160 F.3d 780.

115. *U.S. Airways*, 122 S. Ct. at 1533.

116. *See* Starr, *supra* n. 111.

117. 227 F.3d 1024 (7th Cir. 2000).

118. *Id.*

119. 122 S. Ct. 1516.

120. *See* Starr, *supra* n. 111 (quoting *EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act*, 3 BNA EEOC Compliance Manual, No. 246, at 5454 (Mar. 1, 1999) [hereinafter *Enforcement Guidance*]).

normally transfer employees would still have to re-assign an employee with a disability . . . ."[121] Further, if an employer has a policy prohibiting transfers, it would have to modify that policy unless it could show undue hardship.[122]

The Supreme Court, by a five-to-four vote, rejected the Ninth Circuit approach. The majority set up a sequence of rebuttable presumptions: first, if a qualified individual requests a reassignment because of a disability and the reassignment contravenes a legitimate company policy (like a discrimination-neutral seniority system), then the policy trumps the employee's ADA request "ordinarily."[123] That is, once the employer has shown it is entitled to the presumption because it has met its prima facie burden of demonstrating a countervailing company policy, then the employee has the burden of defeating the presumption by showing that the reassignment is a "reasonable accommodation."[124] Once the employee has met this burden, the employer "then must show special (typically case-specific) circumstances that demonstrate undue hardship in the particular circumstances."[125]

Justice Breyer, writing for the majority declared that this sequence of presumptions constitutes a "practical view of the statute" which "reconcil[es] the two statutory phrases ('reasonable accommodation' and 'undue hardship')."[126] In support of the majority's conclusion, Breyer pointed to time-honored rules of statutory construction including the plain meaning rule,[127] as well as the ADA's purpose which Justice Breyer characterized as an attempt "to diminish or to eliminate the stereotypical thought processes, the thoughtless actions, and the hostile reactions that far too often bar those with disabilities from participating fully in the Nation's life, including the workplace."[128] He also cited case law rulings emanating from lower courts.[129]

Justice Souter authored a dissent in which Justice Ginsberg joined. He argued that the majority's attempt to reconcile the terms "reasonable accommodation" and "undue hardship" directly conflicted with the Act's legislative history.[130] Committee reports from both sides of the aisle stated that

121. *U.S. Airways*, 122 S. Ct. at 1530 (Scalia & Thomas, JJ., dissenting) (quoting *Enforcement Guidance*, *supra* n. 120, at N:2479) (internal quotation marks omitted).

122. *Id.* at 1529. Ideologically speaking, it was an interesting split: Justice Scalia authored a dissent in which Justice Thomas joined; Justice Souter filed a dissent in which Justice Ginsberg joined. Justices Stevens and O'Connor filed concurrences. *Id.*

123. *Id.*

124. *Id.*

125. *U.S. Airways*, 122 S. Ct. at 1523.

126. *Id.* at 1522-23.

127. *Id.* at 1522 (referencing 43 U.S.C §§ 12101(a)-(b)). Notice that this interpretation of statutory purpose gives a broad reading to the Act.

128. *Id.* at 1523 (citing *Reed v. LePage Bakeries, Inc.*, 244 F.3d 254, 259 (1st Cir. 2001) (employee must show the requested accommodation is "ostensibly feasible"; and "undue hardship" is a particularized inquiry into the Company's operations)). The Court also cited several appellate cases that discussed the priority of seniority systems over other statutory rights including Title VII rights and handicap rights under the Rehabilitation Act. *Id.* at 1524.

129. *Id.* at 1523 (citing *Reed*, 244 F.3d at 259; *Borkowski v. Valley C. Sch. Dist.*, 63 F.3d 131, 138 (2d Cir. 1995); *Barth v. Gelb*, 2 F.3d 1180, 1187 (D.C. Cir. 1993)).

130. *U.S. Airways*, 122 S. Ct. at 1534 (Souter, J., joined by Ginsburg, J., dissenting).

seniority systems were to be treated simply as factors in deciding whether a proposed accommodation was reasonable.[131] That, of course, was the approach the Ninth Circuit took. Furthermore, said Souter, Congress had expressly rejected the approach to seniority systems taken by the Court in Title VII cases.[132] Finally, Justice Souter took a look at the particular seniority system at issue in *U.S. Airways*, one that was not sanctioned by agreement with a union but was simply company policy. Souter found that Barnett had met the burden imposed by the majority to demonstrate that the requested reassignment was a "reasonable" (defined by the majority as "feasible") accommodation.[133] Souter pointed out that the employer defined its seniority system as one that was "'not intended to be a contract'" and could be changed without notice.[134] Justice Souter did not engage in a treatise-like analysis of employee handbook law, but he could not resist this aside: "[I]t is safe to say that the contract law of a number of jurisdictions would treat this disclaimer as fatal to any claim an employee might make [for a conflicting reassignment accommodation]."[135]

A reassignment for a disabled employee which competes with a "noncontractual and modifiable at will" company policy must be seen as a "reasonable" one which imposes no "undue hardship."[136] What Souter's dissent makes clear is that the majority selected certain rules of statutory construction in order to reach a particular result . . . one that narrows the Act's coverage.

Justice Scalia (joined by Justice Thomas) pointed to another consequence of the majority's decision: that it invites more litigation because it requires case-specific analysis. Scalia, of course, sought an even narrower interpretation of the Act: the ADA clears away only obstacles *arising from* a person's disability and nothing more.[137] Be that as it may, Scalia is surely correct in his prediction that "the Court's opinion leaves the question whether a seniority system must be disregarded in order to accommodate a disabled employee in a state of uncertainty that can be resolved only by constant litigation . . . ."[138]

The business community celebrated *U.S. Airways* as a victory, just as it had the decision in *Toyota Motor*. And certainly business interests have cause for celebrating any case that restricts the reach of the ADA. However, as was true of

131. *Id.* at 1520.

132. *Id.* at 1533 (Souter, J., joined by Ginsburg, J., dissenting). The Title VII case the majority had referenced in support of its approach was *TWA v. Hardison*, 432 U.S. 63, 79-80 (1997) (an accommodation requested pursuant to Title VII is not "reasonable" if it trumps other employees' seniority rights). *U.S. Airways*, 122 S. Ct. at 1524. Justice Souter quoted the Senate Report as follows: "'The Committee wishes to make it clear that the principles enunciated by the Supreme Court in *TWA v. Harrison* . . . are not applicable to this legislation.'" *Id.* (quoting S. Rpt. 101-16, at 36).

133. *U.S. Airways*, 122 S. Ct. at 1532 (Souter, J., joined by Ginsburg, J., dissenting).

134. *Id.* at 1534.

135. *Id.*

136. *Id.*

137. *Id.* at 1531 (Scalia & Thomas, JJ., dissenting). *See* Marcia Coyle, *Disabled Workers Face Higher Hurdle; A Finer Degree of "Reasonableness,"* Natl. L.J. A1 (May 6, 2002) (citing members of the practicing bar for the proposition that majority opinion invites more litigation and predicting that much of it will focus on the newly-minted "special circumstances" test).

138. *U.S. Airways*, 122 S. Ct. at 1532.

the *Toyota Motor* decision, *U.S. Airways* does little to close the courthouse door to ADA litigation. While it did achieve the "right" result, and did so by way of an argument couched, not in the activist terminology of policy, but in the restraint language of (selected) rules of statutory construction, it did little or nothing to stem the flood of litigation encouraged by an ambiguous statute.

### C. *Chevron U.S.A., Inc. v. Echazabal*

The third ADA case decided in the recent Supreme Court Term was *Chevron U.S.A., Inc. v. Echazabal*.[139] At issue was the "direct-threat" defense provision of the ADA which states that a job qualification standard which includes "'a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace'"[140] does not violate the Act if the individual cannot perform the job safely with reasonable accommodation.[141] Here, we have an unambiguous provision in the ADA: "shall not pose a direct threat to . . . *others*," which in plain meaning parlance seems with elegant simplicity and clarity to mean what it says.

In *Chevron*, the issue was whether the unambiguous statement should be expanded to include a direct threat to the health and safety of the disabled individual. A unanimous Court held that it should.[142] The employer decision at issue in *Chevron* was its refusal to hire the eponymous employee on the grounds that his liver condition would be aggravated by exposure to the toxins at its refinery.[143] Chevron cited EEOC Rehabilitation Act regulations which extended the statutory "direct-threat to others" defense to include a direct threat to oneself.[144] The Ninth Circuit compared the wording of the regulation with the words of the statute and, relying on the plain meaning rule along with the canon *expressio unius exclusio alterius*, found that the regulation exceeded the EEOC's rulemaking authority.[145] Furthermore, it stated that the regulation was in conflict with ADA's "policy against paternalism in the workplace."[146]

In reversing the Ninth Circuit's ruling, the Supreme Court viewed the "direct-threat" defense as inclusive and illustrative rather than exclusive and categorical and it interpreted the canon at issue, "*espressio unius*," as requiring "a series of two or more . . . things" from which the thing at issue is omitted.[147] Thus,

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139. 122 S. Ct. 2045 (2002).
140. *Id.* at 2049 (quoting 42 U.S.C. § 12113(b)).
141. *Id.* (citing 42 U.S.C. § 12113(a)).
142. *Id.* at 2048.
143. *Id.*
144. *Chevron*, 122 S. Ct. at 2046. The Rehabilitation Act of 1973, Pub. L. No. 105-220, § 408(a)(3), 112 Stat. 1202 (1998), as amended, is considered to be the "precursor" of the ADA. Thus Courts feel free to rely on it in interpreting ambiguities in the ADA. The question is whether the "direct threat" defense in the ADA was ambiguous.
145. *Chevron*, 122 S. Ct. at 2048-49.
146. *Id.* at 2048. The canon was defined in *Chevron* this way: "'expressing one item of [an] associated group or series excluded another left unmentioned.'" *Id.* at 2049 (quoting *U.S. v. Vonn*, 122 S. Ct. 1043, 1049 (2002)).
147. *Id.* at 2050.

said the Court, this canon "properly applies only when in the natural association of ideas in the mind of the reader that which is expressed is so set over by way of strong contrast to that which is omitted that the contrast enforces the affirmative inference."[148] Moreover, the Court noted that in drafting the ADA provision at issue Congress used the same language it had used in the Rehabilitation Act (the direct-threat-to-others language) even though it was surely aware that the EEOC had expanded the language to include a direct-threat-to-one's-self provision in its Rehabilitation Act regulation. Because Congress did not comment on the expansion, "[t]here is no way to tell" what Congress intended in the ADA.[149] "Omitting the EEOC's reference to self-harm while using the very language that the EEOC had read as consistent with recognizing self-harm is equivocal at best. No negative inference is possible."[150] The Court also employed a *reductio ad absurdum* argument against the Ninth Circuit's *expressio unius* argument when it queried, "If Typhoid Mary had come under the ADA, would a meat packer have been defenseless if Mary sued after being turned away," simply because the statute does not include harm to the public as a defense?[151] It rejected the Ninth Circuit's paternalism argument because the ADA requires case-specific analysis that precludes the kind of "pretextual stereoty[ping]" endemic to paternalism.[152] Critics of the decision remain unpersuaded and have argued that this decision is illustrative of the kind of result-oriented approach the Court has taken with ADA cases in its overweening attempt to restrict its availability. Here, for example, it has reversed its normal course of relying on the plain meaning of the statute rather than on EEOC interpretation in construing the statute's terms.[153]

### *D. Barnes v. Gorman*

In the fourth ADA case to come before the Court in the recent Term, *Barnes v. Gorman*, the Court again conjoined provisions of the ADA and the Rehabilitation Act and found that remedies available under both Acts did not include punitive damages. The case was brought in a somewhat unusual context: a paraplegic arrestee suffered serious injuries when he was taken from his wheelchair and strapped into a police van because the van in which he was being transported had no wheelchair restraints.[154]

Justice Scalia wrote the opinion for the Court and the trajectory of his argument could have been anticipated. He stated Section 202 references the

148. *Id.* at 2050 (citations omitted).
149. *Id.*
150. *Chevron*, 122 S. Ct. at 2051.
151. *Id.*
152. *Id.* at 2052.
153. *See* Marcia Coyle, *Chevron ADA Case Before High Court; Employee's Own Safety Is the Issue at Hand*, Natl. L.J. A15 (Feb. 25, 2002) (quoting Peter Blanck, Director, University of Iowa's Law Health Policy and Disability Center ("The high court in recent ADA rulings has not been particularly deferential to the EEOC—to employers' advantage") and ("This court, led by justices like [Antonin] Scalia, has been very literal in its reading of statutes .... In *Chevron*, the statute said what it means and we'll see how principled the court will be")).
154. *Barnes*, 122 S. Ct. 2097.

remedies section of the Rehabilitation Act and expressly adopts those remedies.[155] In turn, the remedies section of the Rehabilitation Act refers to the remedies identified in Title VI of the Civil Rights Act and adopts those remedies.[156] Courts have consistently found that there is an implied private cause of action to enforce the provisions of Title VI.[157] While the Supreme Court has previously declared that "appropriate relief" is available "for violation of a federal right,"[158] it has not had occasion to set forth the requirements for relief available under Title VI. Scalia addressed that issue by stating, first, that "Title VI invokes Congress's power under the Spending Clause . . . and [that we] have repeatedly characterized this statute and other Spending Clause legislation 'much in the nature of a *contract*: in return for federal funds the [recipients] agree to comply with federally imposed conditions.'"[159] In addition, punitive damages are generally not available for breach of limited contract actions. Therefore, remedies sought in a cause of action premised on contract doctrine are limited to contract remedies, as are ADA remedies by way of the Rehabilitation Act, by way of Title VI.

Five Justices concurred in the result. Nevertheless, in Justice Souter's concurring opinion, he pointed out that the reasoning upon which Scalia relied for the holding ("federal statutes enacted pursuant to Congress' spending power should be defined by the common law of contracts") was not even argued by the parties.[160] Conceptually, said Souter, there were three possible justifications for excluding a punitive damage award in this case. The narrowest ground was that ordinarily "municipalities are not subject to punitive damages."[161] A somewhat broader rationale (broader, in that it looks not just at the class of defendants in a particular ADA case where an arm or agency of the state is the putative defendant but at all ADA cases) was the rationale argued by the parties: Congress didn't authorize punitive damage awards in ADA and Rehabilitation Act cases. But Scalia's rationale goes well beyond that approach to bar punitive damages from *all cases claiming violation of federal statutes which were enacted pursuant to Congress's Spending Clause power.* Souter declared, "There is . . . no justification for the Court's decision to reach out and decide the case on a broader ground that was not argued below."[162] Despite that fact, Justice Scalia availed himself of the opportunity to narrow remedies not only in ADA cases, but, indeed, across a very broad statutory spectrum.

155. *Id.* at 2100.

156. *Id.* (citing 42 U.S.C. § 12133).

157. *Id.* (citing 29 U.S.C. § 794a(a)(2) (2000)). Title VI "prohibits racial discrimination in federally funded programs" and provides an implied private cause of action to enforce its provisions. *Id.*

158. *Id.* (citing *Cannon v. U. of Chi.*, 441 U.S. 677 (1979)).

159. *Barnes*, 122 S. Ct. at 2100 (citing U.S. Const., art I, § 8, cl. 1 and quoting *Pennhurst St. Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981)).

160. *Id.* at 2104 (Souter, J., joined by Ginsburg & Breyer, JJ., concurring).

161. *Id.* at 2103.

162. *Id.* at 2104.

## III. CONCLUSION

Employer interests prevailed in most of the Court's employment cases this Term. This article has reviewed a few of them. Aside from the Tenth Circuit affirmative action case, *Adarand*, which was included for its local appeal, the selected cases illustrate how the Court has narrowed the protective reach of the ADA. This Term's ADA cases are emblematic not only of the Court's pro-employer proclivities but also of the judicial means by which it achieves pro-employer results. A pattern has emerged, in recent Terms, whereby the Court uses ostensibly technical rules of statutory interpretation to expand the reach of its most controversial and ideological decisions.

One way to state the fundamental public policy at issue in all of these cases is this: What is the proper and most beneficial way to accommodate impaired individuals in society—in the workplace or through public welfare? An activist Supreme Court has gone a long way toward deciding that public policy in recent Terms. Since 1999, the Court has narrowed the ADA in many respects. First, remedies now exclude the catalyst theory for purposes of fee-shifting statutes and punitive damages, in any case, are not available; second, the class of putative defendants now excludes state employers; third, the class of plaintiffs has been narrowed in several significant respects including (a) the kinds of disabilities amenable to accommodation, and (b) the kinds of accommodation available to impaired employees. We may legitimately inquire whether this is the best way to make public policy . . . indeed, whether an earlier Rehnquist Court would have found it so.

# APPENDIX A

I. Employment Law

A. Affirmative Action

1. *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103 (2001).

B. ADA (Americans with Disabilities Act).

1. *Barnes v. Gorman*, 122 S. Ct. 2097 (2002).
2. *Chevron U.S.A., Inc. v. Echazabel*, 122 S. Ct. 2045 (2002).
3. *Toyota Motor Mfg., Ky., Inc. v. Williams*, 122 S. Ct. 681 (2002).
4. *U.S. Airways, Inc. v. Barnett*, 122 S. Ct. 1516 (2002).

C. ADEA (Age Discrimination in Employment Act)

1. *Swierkiewicz v. Foreman*, 534 U.S. 506 (2002).

D. Labor Relations (National Labor Relations Act).

1. *Hoffman Plastics Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002).
2. *BE & K Constr. Co. v. NLRB*, 122 S. Ct. 2390 (2002).

E. Employee Benefits: FMLA (Family and Medical Leave Act); ERISA (Employee Retirement Income Security Act)

1. *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81 (2002).
2. *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002).
3. *Rush-Prudential HMO, Inc. v. Moran*, 122 S. Ct. 2151 (2002).

F. Title VII

1. *Natl. R.R. Passenger Corp. v. Morgan*, 122 S. Ct. 2061 (2002).
2. *Edelman v. Lynchburg College*, 535 U.S. 106 (2002).

G. Arbitration

1. *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279 (2002).

II. Patent Law

A. *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabusbiki Co., Ltd.*, 535 U.S. 722 (2002).

B. *Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826 (2002).

C. *J.E.M. AG Supply, Inc. v. Pioneer Hi-Bred Intl., Inc.*, 534 U.S. 134 (2001).

III. Securities Law

A. *S.E.C. v. Zandford*, 535 U.S. 813 (2002).

IV. Taxation

A. *U.S. v. Fior D'Italia*, 122 S. Ct. 2117 (2002).

V. Bankruptcy

A. *Young v. U.S.*, 535 U.S. 43 (2002).

VI. Real Property

A. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regl. Plan Agency*, 535 U.S. 302 (2002).

VII. First Amendment

A. Canvassing

1. *Watchtower Bible and Tract Socy. of N.Y., Inc. v. Village of Stratton*, 122 S. Ct. 2080 (2002).

B. Commercial Speech

1. *Thompson v. W. States Med. Ctr.*, 535 U.S. 357 (2002).

VIII. Miscellaneous Federal Law

A. Energy Law

1. *N.Y. v. FERC*, 535 U.S. 1 (2002).

B. Coal Industry Retiree Health Benefit Act

1. *Barnhard v. Sigmon Coal Co., Inc.*, 534 U.S. 438 (2002).

C. OSHA

1. *Chao v. Mallard Bay Drilling*, 534 U.S. 235 (2002).

D. Shipping Act

1. *Fed. Mar. Commn. v. S.C. St. Ports Auth.*, 534 U.S. 734 (2002).

E. I.C.A.

1. *City of Columbus v. Ours Garage and Wrecker Serv.*, 122 S. Ct. 2226 (2002).

F. Fair Credit Reporting Act

1. *TRW, Inc. v. Andrews*, 534 U.S. 19 (2001).

G. *Bivens* Rights

1. *Correctional Serv. Corp. v. Malesko*, 534 U.S. 61 (2001).

H. Telecommunications Act

1. *Verizon Md., Inc. v. Pub. Serv. Commn. of Md.*, 535 U.S. 635 (2002).

2. *Verizon Commun., Inc. v. F.C.C.*, 535 U.S. 467 (2002).

IX. Federal Practice

A. *Devlin v. Scardelletti*, 122 S. Ct. 2005 (2002).

B. *JP Morgan Chase Manhattan Bank v. Traffic Stream (BVI) Infrastructure, Ltd.*, 122 S. Ct. 2054 (2002).